IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No. .....

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The opinion of the Supreme Court of Arkansas is reported in 140 S.W. Rep. (2d) 676, and a copy thereof is included in the record.

II.

JURISDICTION

The date of the judgment to be reviewed is May 6, 1940. Petition for rehearing was filed and denied and the judgment became final on June 10, 1940. The complaint alleges a cause of action under the Federal Employers' Liability Act. The Supreme Court of Arkansas denied the defendant, petitioner here, the defense of assumed risk applicable under said Act and denied the defendant the benefit of the provisions of said Act and the Supreme Court of Arkansas based its decision in part upon the presumption of negligence statute of the State of Arkansas contrary to the decisions of the Supreme Court of the United States.

The jurisdiction of this Court to grant a writ of certiorari is found in United States Code, Title 28, Section 344, Paragraph (b) (Judicial Code Section 347, as amended.) The Supreme Court of Arkansas is the highest court in that State.

III.

STATEMENT OF THE CASE

It is submitted that the statement of the case made in the petition for writ of certiorari is sufficient and therefore reference is made to it as a compliance with the rule.

IV.

SPECIFICATIONS OF ERROR

1. The Supreme Court of Arkansas erred in affirming the judgment of the Crawford County Circuit Court in this case and in holding that the case of *St. L. I. M. & S. Ry. Co.* v. *Armbrust*, 121 Ark. 351, (181 S.W. 131) and the case of *St. L. & S. F. R.R. Co.* v. *Carr*, 94 Ark. 246, (126 S.W. 850) were controlling, as both of said cases were based upon the presumption of negligence statute in Arkansas, while the case at bar is brought under the Federal Employers' Liability Act.

2. The Supreme Court of Arkansas erred in ignoring the defense of assumed risk.

3. The Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this Court in the case of *C. M. & St. P. R.R. Co.* v. *Edith F. Coogan*, 271 U.S. 472, and other cases.

4. The Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the verdict under the Federal Employers' Liability Act.

SUMMARY OF ARGUMENT

Point 1. The Supreme Court of Arkansas erred in applying as controlling decisions of the Supreme Court of Arkansas based on the Arkansas presumption of negligence statute in this case brought under the Federal Employers' Liability Act.

St. L. I. M. & S. R. Co. v. *Armbrust*, 121 Ark. 351, 181 S.W. 131.

St. L. S. F. R. Co. v. *Carr*, 94 Ark. 246, 126 S.W. 850.

N. O. & N. E. R.R. Co. v. *Harris*, 247 U. S. 367.

Southern Ry. Co. v. *Gray*, 241 U. S. 333.

Penn. R.R. Co. v. *Chamberlain*, 288 U.S. 333.

Point 2. The Supreme Court of Arkansas erred in ignoring the defense of assumed risk.

Chesapeake & O. Ry. Co. v. *Kuhn*, 76 Law Ed. 157, 284 U.S. 44.

Cross v. *Spokane P. & S. Ry. Co.*, 291 Pac. 336.

Northwestern Pac. R. Co. v. *Bobo*, 78 L. Ed. 462, 290 U.S. 499.

Point 3. The Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this Court.

C. M. & St. P. R.R. Co. v. *Coogan*, 271 U.S. 472.

Point 4. The Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the judgment of the trial court.

Graham v. *C. & N. W. R. Co.*, 143 Iowa 604, 119 N.W. 708.

Samulski v. *Menasha Paper Co.*, 147 Wis. 285, 133 N.W. 142.

M. K. & T. R. Co. v. *Collier*, 157 Fed. 347.

Sexton v. *M. S. R. Co.*, 245 Mo. 254, 149 S.W. 21.

Woolworth Co. v. *Davis*, 41 Fed. (2d) 342.

Quock Ting v. *United States*, 140 U.S. 417.

ARGUMENT

The decision of the Supreme Court of Arkansas is a matter of great importance to this petitioner not only in this case, but in other cases that may arise which will be determined by the Supreme Court in accordance with its opinion in this case.

Point I.

The Supreme Court of Arkansas erred in applying as controlling decisions of the Supreme Court of Arkansas based on the Arkansas presumption of negligence statute in this case brought under the Federal Employers' Liability Act.

As suggested, the accident occurred October 13, 1937. Suit was not filed until December 5, 1938, and the allegation as to negligence upon which the case was tried was not alleged in the original complaint but in the amended complaint filed March 2, 1939. The defendant specifically plead as a defense assumed risk and this defense was apparently totally ignored by the Court as it is not mentioned in its opinion.

It appears from the opinion that the Supreme Court of Arkansas relied upon cases based upon the presumption of negligence statute in Arkansas, as the court said:

> "Issues arising out of careless or improper loading of coal on the tender so that a lump fell therefrom causing injuries have arisen and been decided by our own court. The very question more favorably stated for the railroad company than in the instant case appears in St. L. I. M. & S. R. Co. v. Armbrust, 121 Ark. 351, (181 S.W. 131). **The negligence established in the cited case is not different in kind or degree from that proven by appellee.**

St. L. S. F. R. Co. v. *Carr*, 94 Ark. 246, (126 S.W. 850)."

Referring to these cases, we find in the case of *St. L. I. M. & S. R. Co.* v. *Armbrust* that the Court held:

(a) "Proof that plaintiff's injury was caused by the running of a train, raised a presumption of negligence against the railroad company.

(b) "A plaintiff who has been injured by the operation of a train is entitled to recover under the statute, when he has made out a prima facie case, unless the defendant introduces evidence to show that it was not guilty of negligence."

In the case of *St. L. S. F. R. Co.* v. *Carr*, the Court held:

"Where a pedestrian upon a highway is injured by a door projecting from a car during the running of a train, a prima facie case of negligence on the part of the railroad company is made out."

This Court in the case of *N. O. & N. E. R.R. Co.* v. *Harris*, 247 U.S. 367, held:

"The so-called 'Prima Facie Act' of Mississippi, set out below, provides that in actions against railroads for damages proof of injury inflicted by an engine propelled by steam shall be prima facie evidence of negligence. * * *

"The Federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish."

and the Court further stated in that opinion:

"In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as

interpreted and applied in Federal courts; and negligence is essential to recovery. * * *

"* * * the question of burden of proof is a matter of substance, and not subject to control by laws of the several states."

and in the case of *Southern Ry. Co.* v. *Gray*, 241 U.S. 333, this Court said:

"As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it, and applicable principles of common law as interpreted and applied in Federal courts. Negligence by the railroad company is essential to a recovery; and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error."

And this Court in the case of *Penn. R.R. Co.* v. *Chamberlain*, 288 U.S. 333, says:

"The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned.

"Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible."

Point II.

The Supreme Court of Arkansas erred in ignoring the defense of assumed risk.

The petitioner herein, defendant in the trial court, specifically pleaded as a defense assumed risk. He asked for instructions on the doctrine of assumed risk.

In the brief in the Supreme Court of Arkanas under

the heading of "Plaintiff is Barred From A Recovery In This Action Under the Doctrine Of Assumption Of Risks" the point was presented to the Supreme Court of Arkansas and the same point was stressed in the oral argument.

In the case of *Cross* v. *Spokane P. & S. Ry. Co.*, 291 Pac. 336, certeriari denied. 75 L. Ed. 1436, it was held:

> "Be the risks small or great, if they are risks attendant upon or inherent in employment, they are but the usual and ordinary risks of employment, and are assumed."
>
> *Northwestern Pac. R. Co.* v. *Bobo*, 78 Law Ed., 462, 290 U.S. 499.
>
> *Chesapeake & O. Ry. Co.* v. *Kuhn*, 76 Law Ed. 157, 284 U.S. 44.

The plaintiff in this case testified that he was standing within seven or eight feet of the train as it passed and the risk of being struck by some object thrown by the train was one of the ordinary risks of his employment and one which he clearly assumed.

The Supreme Court of Arkansas erred in apparently ignoring this defense as it is not mentioned in the opinion.

Point III.

The Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this Court.

This Court in the case of *C. M. & St. P. R. Co.* v. *Coogan*, 271 U.S. 472, said:

> "The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act, and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control

> of the several states. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. * * *
>
> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

There is not a scintilla of evidence to show that the tank of the engine was negligently or improperly loaded with coal. The uncontradicted evidence showed that the train had traveled a distance of 57 miles from its terminal where the coal was placed in the tank of the engine to the point where the accident occurred and that about 40% of the coal was used in that distance, and according to the plaintiff's testimony he was standing with a lantern in his hand a distance of seven or eight feet from the track, and his testimony to that effect is quoted by the Supreme Court of Arkansas. The Court also says that the "missile", "object" or "coal" fell or was thrown from the tank of the engine and it is impossible to reconcile that statement with the former written statement of the plaintiff that he did not know how he was injured, and the further fact that no coal was found by anyone at the place where he was standing at the time that he said that a lump of coal struck him.

The Supreme Court of Arkansas in its opinion on this point states:

> "So, we think, the jury was warranted in finding there was negligence in the operation of the train with the tender loaded as described. There was in addition some proof that the rock found at or very near the place of the accident was slate-like or the

kind sometimes found in coal. Such evidence was substantial - positive - not at all impossible or even improbable, though for the most part contradicted."

This statement of the Court we respectfully submit does not supply the deficiency in the evidence. The only evidence tending to establish "that the rock found at or very near the place of the accident was slate-like or the kind sometimes found in coal" is found in the testimony of Will Wiley, father of the respondent, who says:

> " * * * that McLendon, the Assistant Bridge Building Superintendent, told him that he had found a piece of slate, lying near the track, such as came out of coal, and he said it weighed 12 or 15 pounds and that it was slate-like or coal."

This was positively denied by McLendon, but even if the statement had been made it would not constitute evidence "substantial - positive - not at all impossible or even improbable, through for the most part contradicted" as against this petitioner. It is not necessary to cite authority in support of the rule that the declaration of an employee

> " * * * as to who was responsible for an injury, made after its occurrence, is incompetent as against his employer for the reason that his emloyment does not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duties of employment."
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> *Casteel* v. *Yantis-Harper Tire Co.*, 183 Ark. 912.

Point IV.

The Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the judgment of the trial court.

It is stated that the rule as to judicial notice "enumerates three material requisites":

> (a) "The matter of which a court will take judicial notice must be a matter of common and general knowledge. * * *
>
> (b) "A matter properly a subject of judicial notice must be 'known', that is, well established and authoritatively settled, not doubtful or uncertain." 15 R.C.L. 1058-1059.

The Supreme Court of Arkansas in its opinion states:

> "All of us know from observation that locomotives fueled by coal are ordinarily loaded at the coaling stations to capacity and that along the right of way, particularly near these coaling stations, lumps of coal sometimes roll off, and may be found near the tracks of all such railroad companies. Nor is it extremely unusual to find or see lumps of coal upon the right of way of the railroads perhaps considerable distances from the coaling stations.
>
> "Indeed, it appears that coal that has fallen from the top of the tenders is not regarded as the result of a particularly wasteful practice, but probably by the unfortunate poor who live nearby it seems to be considered an involuntary contribution."

If this statement of the Court is to be accepted it would seem to follow that the plaintiff (respondent) also knew, or by the exercise of ordinary care could have known that there was danger in standing too near the track when a freight train was passing, and therefore he assumed the risk. However, the plaintiff states that he was standing a distance of seven or eight feet from the track when a lump of coal the size of his hat fell from the tender and struck him on the head instead of falling directly to the ground. His testimony is not only at variance with his written statement, but is contrary to the law of

gravitation, of which the Supreme Court of Arkansas could have well taken judicial notice. But the Supreme Court of Arkansas states that:

> "It is answered by the testimony of the appellee who says that he saw the object that struck him on the head roll or fall from the top of the tender."

In *Graham* v. *C. & N. W. R. Co.*, 143 Iowa 604, (119 N.W. 708), it is said:

> "The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court."

In *Samulski* v. *Menasha Paper Co.*, 147 Wis. 285, (133 N.W. 142), the Supreme Court of Wisconsin said:

> "The testimony of a witness or finding of a jury contrary to manifest physical situations, common knowledge, or conceded facts, is efficiently impeached thereby."

In *M. K. & T. R. Co.* v. *Collier*, 157 Fed. 347, the Circuit Court of Appeals for the Eighth Circuit said:

> " * * * Where a witness' testimony is positively contradicted by the physical facts, neither the court nor jury can be permitted to credit it."

Petition for certiorari in that case was denied: 209 U. S. 545.

In *Sexton* v. *M. S. R. Co.*, 245 Mo. 254, (149 S.W. 21), the Supreme Court of Missouri said:

> " * * * The statements of plaintiff as to this occurrence must be viewed in the light of all the sursounding facts and circumstances. If the physical facts and all the circumstances appearing in evidence, together with the surrounding conditions, absolutely negative and destroy the force of such statements,

then, in contemplation of law, such statements do not amount to any substantial evidence of the facts to which they relate."

In *Woolworth Co.* v. *Davis*, 41 Fed. (2d) 342, the Court said:

"In the United States court, the rule is that there must be substantial evidence, as distinguished from a scintilla or modicum of evidence, to justify submission of a case to a jury. In *Small Co.* v. *Lamborn & Co.*, 267 U.S. 248, this court speaking through Mr. Justice Van Devanter, said:

'* * * The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction, as in many others. (Citing cases.)'

"The rule is likewise settled, that 'when the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it.' (Citing cases.) * * * Judgments cannot and should not stand if they are entered upon testimony that cannot be true."

And this Court in *Quock Ting* v. *United States*, 140 U.S. 417:

"* * * He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, **as to discredit his whole story.**"

The Supreme Court of Arkansas contrary to the decisions of many State courts and the Federal courts makes the following statement:

"If there was negligence in loading the coal or any part of it was so placed that it might have fallen off or that it would later fall off and cause the particular injury complained of, we cannot say now, as

a matter of law, that a duty devolved upon the appellee at the time of the trial to make an explanation of all the facts that may have been involved causing the particular accident."

We submit "that a duty devolved" upon the respondent as plaintiff in his suit to state all of the facts within his knowledge.

CONCLUSION

In conclusion we desire to call this Court's attention to the "Petition for Rehearing" filed in the Supreme Court in which the defense of assumed risk which was raised in the answer and which was included in the instructions requested from the trial court, was also again called to the attention of the Supreme Court in paragraph VI thereof, yet, the Court ignored assumed risk as a defense. This question was also stressed in the oral argument before the Court, but Justice Baker who wrote the opinion was not present during the oral argument.

We respectfully submit that the decision and opinion of the Supreme Court in this case conflicts with many decisions of the Federal Courts, including this Court to which reference has been made herein, and conflict in the opinion of the courts in construing a Federal Statute is a recognized ground for the granting of certiorari.

Respectfully submitted,

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